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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926

No. [redacted] 164

JUAN G. GALLARDO, TREASURER,
Defendant-Appellant,

—vs.—

SANTENI FERTILIZER COMPANY,
Complainant-Appellee.

Appeal from the District Court of the United States for the District of Porto Rico, transferred from the United States Circuit Court of Appeals for the First Circuit under the Act of September 14, 1922.

BRIEF OF APPELLEE IN OPPOSITION TO MOTION TO RETRANSFER TO THE UNITED STATES CIRCUIT COURT OF APPEALS.

NELSON GAMMANS,
Solicitor for
Complainant-Appellee.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 840.

JUAN G. GALLARDO, TREASURER,
Defendant-Appellant,

—vs.—

SANTINI FERTILIZER COMPANY,
Complainant-Appellee.

BRIEF OF APPELLEE IN OPPOSITION TO MOTION TO RETRANSFER TO THE UNITED STATES CIRCUIT COURT OF APPEALS.

STATEMENT OF THE CASE.

This is a motion filed by the defendant-appellant, the Treasurer of Porto Rico, for the retransfer to the United States Circuit Court of Appeals, First Circuit, of an appeal transferred by the Circuit Court of Appeals to this Court. The ground of the transfer by the Circuit Court of Appeals was that the appeal from the decree of the District Court should have been taken to this Court rather than to the United States Circuit Court of Appeals (R., 32-34).

The suit was instituted in the United States District Court for the District of Porto Rico by the complainant-appellee, a taxpayer, to enjoin the making and enforcing by the defendant-appellant of certain property tax assessments. The grounds upon which the assessments were

complained of were: first, that they covered foreign imports in the original packages in which imported by complainant from foreign countries, all in violation of the Federal Constitution; and, second, that they assessed complainant's stock of merchandise on hand January 15th, "tax day," instead of assessing the "average value" during the year preceding the assessment, as required by Article 294 of the Political Code of Porto Rico. There was no diversity of citizenship and the jurisdiction of the Court was based upon the constitutional question. The complainant alleged (Complaint, par. 3; R., 1) "that the amount in controversy in this suit exceeds the sum of $5,000, exclusive of interest and costs." This allegation was expressly admitted in the answer (Answer, par. 1; R., 9). No jurisdictional question was raised in the District Court. Nor was any federal non-constitutional question discussed, the entire argument as to imposts being based on *Brown vs. Maryland*, 12 Wheat. 419 (1827), and *Low vs. Austin*, 13 Wall. 29 (1871). The District Court entered a decree enjoining the enforcement of the assessments on both grounds (R., 16). The decree was entered March 31, 1925, and under Section 14 of the Act of February 13, 1925, the appeal was therefore governed by the law theretofore existing and more particularly by Section 238 of the Judicial Code, subdivision 3.

The defendant-appellant, perhaps overlooking Section 14 of the Act of February 13, 1925, took his appeal to the United States Circuit Court of Appeals, First Circuit, instead of taking a direct appeal to this Court. In the Circuit Court of Appeals oral argument was had on the merits and some time thereafter jurisdictional questions were raised by the Court *sua sponte* and supplemental briefs were called for. On the supplemental briefs and without oral argument, the Court on March 3, 1926 (R., 40), held that the constitutional question did not involve the jurisdictional amount and remanded with costs with instructions to the District Court to dismiss for want of jurisdiction, and without granting complainant the privi-

lege of amending in either court. Complainant-appellee then moved for a rehearing, pointing out various errors, including the disregard of *Berryman vs. Trustees of Whitman College*, 222 U. S. 334 (1912), and similar cases, and pointing out also that the Circuit Court of Appeals itself was without jurisdiction. After oral argument called for by that Court, the Circuit Court of Appeals on December 18, 1926 (R., 34), vacated its decree of March 3, 1926, and transferred the appeal to this Court. The ground upon which dismissal or transfer was asked in the Circuit Court of Appeals was that the sole question upon which the jurisdiction of the District Court was based was a constitutional one and that in such cases this Court had exclusive jurisdiction on appeal.

Where there is no diversity of citizenship and there are no federal non-constitutional questions and the only questions alleged (aside from the non-federal ones) relate to the construction or application of the Constitution, this Court and not the Circuit Court of Appeals has jurisdiction on appeal.

McMillan Co. vs. Abernathy, 263 U. S. 438 (1924);

Raton Water Works Co. vs. Raton, 249 U. S. 552 (1919);

Carolina Glass Co. vs. South Carolina, 240 U. S. 305 (1916);

Union & Planters' Bank vs. Memphis, 189 U. S. 71 (1903);

Holt vs. Indiana Mfg. Co., 80 Fed. 1 (C. C. A., 7th Circ., 1897).

The opposition in the Circuit Court of Appeals was based on the propositions that the constitutional question was frivolous and that federal non-constitutional questions were involved.

The appellant's brief on the present motion raises these same two points and adds one to the effect that by argu-

ing in the Circuit Court of Appeals certain alleged federal non-constitutional questions (there raised for the first time in the brief of the defendant-appellant), the complainant-appellee has accepted the jurisdiction of that Court or waived objection to the want of jurisdiction or is estopped from questioning the jurisdiction.

I.

THE CONSTITUTIONAL QUESTION WAS SUBSTANTIAL.

The constitutional question was whether the Legislature of Porto Rico could impose a property tax on imports in the hands of the importer in the original packages in which imported; in other words, whether *Low vs. Austin*, 13 Wall. 29 (1871) is applicable to Porto Rico. *Low vs. Austin* is based upon an immunity under the Federal Constitution. If the relevant clause of the Constitution applies to Porto Rico, the tax is invalid.

Paragraph 8 of the complaint (R., 2-3) alleged:

> "• • • all of which merchandise on January 15, 1923, was on the dock and warehouse of the complainant in the City of San Juan in the original bags in which same had been imported from Germany and France by complainant and which consequently retained its character of imports from foreign countries and was at the time exempt as such from any property or other taxes imposed or which could be imposed by the government of Porto Rico."

Paragraph 13 of the complaint alleged (R., 5):

> "Said acts done or threatened to be done are furthermore illegal and without warrant of law in that said Political Code as construed by the taxing

> officers of the government purports to tax goods imported from foreign countries while still in the original packages in the hands of the original importer and before the same have become mingled in the commerce of the Island of Porto Rico; all of which is in violation of the Constitution of the United States, and especially of paragraph 3 of Section 8 of Article I thereof."

It should be noted that the words "that is to say, of the 'commerce clause'" at the end of the quotation on page 6 of appellant's brief, are not a part of the quotation.

It may perhaps have been better pleading to have specified Article I, Section 10, Clause 2, of the Constitution as well as Article I, Section 8, Clause 3, but we submit this was not essential. The assessment is alleged to have been in violation of the Federal Constitution and defendant could have been in no doubt as to the grounds of objection in view of the pleading that part of the merchandise "on January 15, 1923, was on the dock and warehouse of the complainant in the City of San Juan in the original bags in which same had been imported from Germany and France by complainant and which consequently retained its character of imports from foreign countries and was at the time exempt as such from any property or other taxes imposed or which could be imposed by the government of Porto Rico" and in view of the pleading that defendant for the year subsequent "threatens to include in said assessment merchandise in the hands of complainant on January 15, 1924, in the original packages in which the same has been imported by complainant from foreign countries and which has not yet become mingled in the local commerce of Porto Rico."

Brown vs. Maryland was decided on both the "commerce clause" and the "imports clause" and *Low vs. Austin* apparently on the "imports clause" alone.

The appellant now seems to disregard the very existence of the "imports clause" and in the Circuit Court of Ap-

peals attempted to dispose of it by arguing that Porto Rico is clearly not a "State." The question can not be disposed of in this summary fashion.

See:

Stoutenburgh vs. Hennick, 129 U. S. 141 (1889);
Hartley vs. Kansas City So. Ry. Co., 187 U. S. 617 (1903);
Geofroy vs. Riggs, 133 U. S. 258 (1890);
Talbott vs. Silver Bow County, 139 U. S. 438 (1891);
Downes vs. Bidwell, 182 U. S. 244 (1901), per Mr. Justice Brown;
The Abercorn, 26 Fed. 877, aff'd 28 Fed. 384 (Circ. Ct., Oregon, 1886).

Mr. Justice Brewer, delivering the opinion of this Court in *Talbott vs. Silver Bow County*, *supra*, said at page 444:

> "Still further, while the word State is often used in contradistinction to territory, yet in its general public sense, and as sometimes used in the statutes and the proceedings of the government, it has the larger meaning of any separate political community, including therein the District of Columbia and the Territories, as well as those policial communities known as States of the Union. Such a use of the word State has been recognized in the decisions of this Court."

The commerce clause likewise may cover commerce between Porto Rico and foreign countries in spite of the fact that Porto Rico for many purposes is not technically a "State."

See

Hartley vs. Kansas City So. Ry. Co., 187 U. S. 617 (1903).

The raising of the constitutional question is justified by decisions of this Court, by a subsequent decision of the Circuit Court of Appeals, First Circuit, and by the decree herein in the District Court.

This Court has held that certain sections of the Constitution are applicable *proprio vigore* in Porto Rico. Mr. Justice White in *Downes vs. Bidwell*, 182 U. S. 244, 289 (1901) repudiated the idea that Congress has power to extend or withhold the application of the Constitution to Porto Rico.

At page 292, he said:

> "In the case of the territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable."

This opinion "has become the settled law of the court."

> *Balzac vs. Porto Rico*, 258 U. S. 298, 305 (1922); *Dorr vs. United States*, 195 U. S. 138, 143, 147 (1904).

In *Balzac vs. Porto Rico*, Mr. Chief Justice Taft, delivering the opinion, said at page 312:

> "The Constitution of the United States is in force in Porto Rico as it is wherever and whenever the sovereign power of that government is exerted. • • • The real issue in the *Insular Cases* was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which of its provisions were *applicable* by way of limitation upon the exercise of executive and legislative power *in dealing with new conditions and requirements*." (Italics ours.)

In other words, whether a constitutional provision is applicable or not to Porto Rico depends on the status of the Island, its relationship to the United States, and its conditions and requirements. This will be referred to hereinafter.

The Fifth Amendment is said to be applicable in Porto Rico.

> *Downes vs. Bidwell*, 182 U. S. 244 (1901);
> *Ochoa vs. Hernandez*, 230 U. S. 139 (1913);
> *Balzac vs. Porto Rico*, 258 U. S. 298, 312, 313 (1922).

The purpose of the constitutional provisions relating to commerce (Article I, Section 8, Clause 3, and Article I, Section 10, Clause 2) was to secure uniformity. The framers of the Constitution must have thought every possibility was covered by the phrase "commerce with foreign nations, and among the several States, and with the Indian Tribes" and could not have intended to except other governmental bodies within or without the Union.

Under a system whereby the Federal Government includes Porto Rico within the customs barriers of the Union (unlike the Virgin Islands), there is as much need for uniformity in the case of Porto Rican "commerce with foreign nations" as in the case of New York "commerce with foreign nations." Porto Rico must therefore be included within the scope of the "commerce clause" (Art. I, Sec. 8, clause 3) and the imports provision (Art. I, Sec. 10, clause 2).

Whether the "imports clause" is applicable to Porto Rico has not been decided by this Court, nor has this Court passed on the applicability of the "commerce clause" to foreign commerce since the status of Porto Rico created by its entry into the American customs system.

In any case, however, these decisions certainly repudiate the appellant's proposition (p. 31 of appellant's brief in the Circuit Court of Appeals):

> "That the Constitution of itself does not apply to Porto Rico is too well settled to require discussion;"

and repudiate appellant's proposition (p. 10 of brief in this court):

> "The validity of its" (Porto Rico's) "acts, therefore, in so far as the questions presented by the facts alleged in this bill are concerned, is to be determined, not by a consideration of any of the clauses of the Constitution defining the correlative powers of the Federal Government and of the States, *but solely by an examination of the Organic Act for Porto Rico and other acts of Congress* • • •." (Italics ours.)

The Circuit Court of Appeals for the First Circuit, in the *Porto Rico Tax Appeals*, 16 Fed. (2d) 545, on January 7, 1927, held:

> "*Brown vs. Maryland* is applicable to importations from foreign countries sold by the importers in the original packages, and the taxes as to such importations so sold must be enjoined."

Low vs. Austin, 13 Wall. 29 (1871), relating to property taxes, as in the case at bar, is based upon the principles of *Brown vs. Maryland*, involving license taxes. The decision that *Brown vs. Maryland* is applicable to Porto Rico means that the Circuit Court of Appeals for the First Circuit considers *Low vs. Austin* likewise applicable.

The District Court in its decree in this case sustained the appellee's claim that the property tax on goods in original packages is invalid (R., 17). In none of its fourteen assignments of error does the appellant even assign as error this holding of the District Court (R., 18-20). The failure to mention the question in the opinion and in

appellant's assignment of errors shows that the proposition was practically conceded by counsel below and that the real contest was on the question of "average value." In the Circuit Court of Appeals the constitutional question was discussed at length in the briefs of both parties on appeal and orally at some length by counsel for both parties, a discussion into which members of that Court entered. In view of all this we must assume that the constitutional question was seriously raised and is not "frivolous."

The argument of the defendant-appellant reduces itself to the proposition that a claim sustained in the decree of the District Court, not questioned in the assignment of errors, approved by the Circuit Court of Appeals in an analogous case, and in line with the reasoning of this Court in several cases, is not only unsound but frivolous.

II.

NO FEDERAL NON-CONSTITUTIONAL QUESTION IS INVOLVED.

Subdivision 3 of Section 238 of the Judicial Code provided for a direct appeal to this Court

> "in any case that involves the construction or *application* of the Constitution of the United States."

What questions are involved are to be determined from the pleadings, not by what the defeated party thinks could possibly have been alleged by his adversary. It is the party raising the question who determines the nature of the case.

> *The Fair vs. Kohler Die Co.*, 228 U. S. 22 (1913);
> *Smith vs. Kansas City Title Co.*, 255 U. S. 180 (1921);
> *McMillan vs. Abernathy*, 263 U. S. 438 (1924), *semble;*

Lemke vs. Farmers' Grain Co., 258 U. S. 50 (1922), *semble;*
Chappell vs. U. S., 160 U. S. 499 (1896);
Boske vs. Comingore, 177 U. S. 459 (1900);
McCurdy vs. U. S., 246 U. S. 263 (1918).

As Mr. Justice Holmes said in delivering the opinion in *The Fair vs. Kochler Die Co.*, 228 U. S. 22 (1913), at pages 24-25:

> "Obviously the plaintiff sued upon the patent law, so far as the purport and intent of the bill is concerned. * * *
>
> Of course the party who brings a suit is master to decide what law he will rely upon and therefore does determine whether he will bring a 'suit arising under' the patent or other law of the United States by his declaration or bill."

The nature of the "*case*" depends on the complaint and not on considerations suggested by the ingenuity of counsel on appeal. To go into these considerations would be to allow defendant at this time to rewrite complainant's complaint and to change the nature of the "*case*" as one "involving the construction or application of the Constitution."

Whether or not it would have been better pleading to have alleged specifically violation of the "imports clause" as well as of the "commerce clause", the fact remains that the only ground of invalidity stated in the complaint is that the tax "is in violation of the Constitution of the United States." There is not one word in the pleadings about any other federal question.

Paragraph 8 of the complaint (R., 3) alleges that the part of the stock in trade which consists of imported goods

> "retained its character of imports from foreign countries and was at the time exempt as such from any property or other taxes imposed or which could be imposed by the Government of Porto Rico."

All that this means is that such property is exempt from existing or future property taxes. The reason for the exemption is the constitutional one stated in paragraph 13 of the complaint.

The appellant argues (R., 11-12) that the appellee could have pleaded violations of the Organic Act, yet the appellant goes on (R., 16) to question the soundness of such suggested federal non-constitutional questions. In appellant's brief before the Circuit Court of Appeals (pp. 28-30 of that brief) appellant argued at length that there is nothing in the Organic Act to exempt imports from Insular taxes. Appellant's argument seems to be that any federal question which might plausibly have been raised is involved in a case, although not in fact raised in the pleadings and although unsound in substance.

The reiterated statement of appellant that Federal non-constitutional questions are involved deserves some specification of the Federal non-constitutional questions said to be involved. The Organic Act, to the best of our knowledge, in fact contains no direct limitation of taxes on imports. True, the provisions of the Organic Act were mentioned in argument, but their importance is to show the applicability of the constitutional provision.

We do not say that the Organic Act need be totally disregarded. As Mr. Justice White said in *Downes vs. Bidwell*, 182 U. S. 244 (1901), at pages 293, 294:

> "The determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the *situation* of the territory and its *relations to the United States*. * * * The *status* of a particular territory has to be taken in view when the applicability of any provision of the Constitution is questioned * * *." (Italics ours.)

And as stated by Mr. Justice Day in *Dorr vs. United States*, 195 U. S. 138 (1904) at page 142:

> "The limitations which are to be applied in any given case involving territorial government must depend upon *the relation of the particular territory to the United States.*" (Italics ours.)

So also, Mr. Chief Justice Taft in *Balzac vs. Porto Rico*, 258 U. S. 298 (1922), as appears at pages 311-312, entered into an examination of many statutes, postal, customs, navigation, bankruptcy, banking, etc., to determine whether the status of the Island was such that the Sixth Amendment was applicable.

Whether Porto Rico is within the American customs system and similar considerations all bear on its status. This does not mean, however, that the constitutional question is any the less exclusively involved. The appellant's proposition may be that all constitutional questions in Porto Rico are also questions arising under the Organic Act because the latter, section 58, incorporates all Federal laws (including presumably the Constitution and treaties) not locally inapplicable. Were that sound, there could have been no exclusively constitutional question in Porto Rico.

To a certain extent the provisions of the Constitution are adopted by implication in every State constitution, but one would hardly argue that there are no more federal constitutional questions which can be taken from the highest courts of the various States to this Court.

Whether we adopt the theory that the Constitution applies *proprio vigore* when the status warrants or the discredited theory that it applies only when Congress extends it, the legislation of Congress in creating the status or extending the Constitution must be examined. To say that ordinary federal questions are thus involved in addition to those of the construction or *application* of the Constitution would mean that subdivision 3 of Section 238 of the Judicial Code would be inapplicable to Porto Rico.

A good deal is said, in appellant's brief, about the form of the decree. Section 238 refers to the "case", not to

the decree. Every decision goes into an analysis of the pleadings, not of the decree. It is said to be significant that the decree said nothing of unconstitutionality. Appellant argues (appellant's brief, pp. 11-13) that because the reasoning of the District Court was not recited in the decree, it must be assumed that the Court's reasons were other than those pleaded and argued. Complainant alleged and argued unconstitutionality. The District Court decreed the tax invalid. The argument is that because the decree did not recite unconstitutionality as the reason, the reason must have been some other federal ground not pleaded nor argued. We are asked to assume that the Court below decided on a ground not advanced in the pleadings and not mentioned in the decree. We assume that no argument in answer to this is necessary. It seems much more reasonable to suppose that the reason the District Judge failed to discuss the question in his opinion and the reason the defendant-appellant failed to raise the question in the assignments of error was that the ground of the relevant part of the decree was considered obvious.

III.

OBJECTION TO THE WANT OF JURISDICTION OF THE CIRCUIT COURT OF APPEALS IS NOT WAIVED NOR IS COMPLAINANT-APPELLEE ESTOPPED.

The proposition of the appellant seems to be that the appellee by arguing certain alleged federal questions in the Circuit Court of Appeals (not in the District Court) has waived the want of jurisdiction of the Circuit Court of Appeals.

Certain passages from the appellee's brief in the Circuit Court of Appeals are quoted by appellant. These must be considered in their context. All references to the Organic Act were in answer to the appellant's arguments (pp. 24-30 of his brief in the Circuit Court of Appeals) that Congress has absolute power over Porto Rico and that

Congress had authorized certain taxes. In endeavoring to meet appellant on a common ground for argument, the appellee in its brief below may have gone too far in concessions for the sake of argument.

Under the doctrine that the Constitution applies *proprio rigore* where applicable to the situation, a full discussion of the Organic Acts of Porto Rico was necessary to determine just what the status of Porto Rico was, and whether it was outside the customs system or within that system. Under the discredited theory that the Constitution applies only when Congress extends it, a theory apparently held by defendant-appellant, a discussion of federal statutes is necessary to discover whether a particular part of the Constitution has been extended.

If in the District Court the only question were a constitutional one and this Court had exclusive jurisdiction on appeal, how could any proceedings before another court without jurisdiction affect the jurisdiction of this Court?

We further submit that the briefs in the Circuit Court of Appeals are no part of the pleadings or record and should be entirely disregarded. They are no more binding than oral argument. If any briefs are to be considered in determining what questions were involved, the briefs before the *District Court* are material. The Court will notice that these have not been filed *nor mentioned*. The fact is that neither in the briefs nor on the oral argument before the District Court was the Organic Act mentioned or federal non-constitutional questions discussed.

We trust that the Court will not receive an erroneous impression of the proceedings in the District Court from remarks in the appellant's brief not justified by the record nor by the facts *dehors* the record.

It is said at page 3 of appellant's brief:

> "The appeal was thus taken to the Circuit Court of Appeals * * * because appellant understood appellee's bill of complaint as well as the decree of

> the District Court to proceed upon the theory that the tax in question was violative of the federal Organic Acts for Porto Rico * * * and other related federal statutes,—as well as upon appellee's alleged constitutional rights under the United States Constitution."

If the defendant-appellant had any such misunderstanding, it was not justified by anything done or said in the District Court. The complaint did not mention federal non-constitutional questions; the argument in the District Court was based only on *Brown vs. Maryand* and *Low vs. Austin;* the decree did not mention any federal non-constitutional questions; nor did the assignment of errors mention any federal questions, constitutional or non-constitutional. The Organic Act was not mentioned in any court until sections thereof were discussed in *appellant's* brief in the Circuit Court of Appeals. We submit that appellant in taking his appeal in the District Court could not have been misled by anything which took place subsequently in the Circuit Court of Appeals.

On page 17 of his brief, appellant intimates that the appellee has misled the appellant, the District Court, and the Circuit Court of Appeals by letting them assume that federal non-constitutional questions were involved. As to the appellant, if he were misled by anything in the Circuit Court of Appeals, it was long subsequent to his having made the mistake of going to the wrong court. As to the District Court, it must be assumed that the Court granted the decree on the only ground mentioned in the complaint. As to the Circuit Court of Appeals, that Court itself is the best judge of whether it was "misled." That Court in its opinion (R., 38) of March 3, 1926, written while that Court was still unaware of its want of jurisdiction, said:

> "No provision of the 'Jones Act' or of the Customs Laws is set out or alleged in the plaintiff's bill as a ground of Federal jurisdiction."

And in its opinion (R., 33) of December 18, 1926, it stated:

> "The jurisdiction of the District Court was invoked solely upon the ground that the controversy involved the construction or application of the Constitution of the United States. As according to the allegations of the bill, the jurisdiction of the District Court was invoked upon the ground that the controversy involved the construction or application of the Constitution *and that alone*, this court is without jurisdiction to entertain the appeal, for in such cases an appeal lies only to the Supreme Court." (Italics ours.)

That Court, even though it had no jurisdiction to pass on the merits of the appeal, was entirely familiar with the proceedings before it and apparently saw nothing in them to justify any alleged waiver, estoppel or consent to jurisdiction.

Perhaps too much attention has been devoted to these questions of waiver or estoppel. It is difficult to understand how a federal appellate court can have jurisdiction conferred upon it by litigants. A rule of law that jurisdiction can be conferred by acquiescence of the parties litigant would result in the inability of this Court to dismiss appeals *sua sponte* where it clearly has no appellate jurisdiction and would force it to hear all appeals in which both parties wish a decision by this Court.

CONCLUSION.

IT IS THEREFORE RESPECTFULLY SUBMITTED THAT THIS COURT HAD EXCLUSIVE JURISDICTION OVER THE APPEAL AND THAT THE CIRCUIT COURT OF APPEALS COMMITTED NO ERROR IN TRANSFERRING THE CASE TO THIS COURT. THE MOTION TO RETRANSFER THE CASE TO THE CIRCUIT COURT OF APPEALS SHOULD BE DENIED.

Respectfully submitted,

NELSON GAMMANS,
Solicitor for Complainant-Appellee.